IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATIONS NO. 168, 169 AND 170 OF 2005.

Criminal Misc. Application No. 168/2005.

Mrs. Vatsala Gadekar,
presently in Central Jail,
Aguada. .... Applicant.

Versus

S T A T E,
Through Public Prosecutor,
Panaji, Goa. .... Respondent.

Criminal Misc. Application No. 169/2005.

Shailesh Gadekar,
presently in Judicial Custody,
Vasco, Sadda. .... Applicant.

Versus

S T A T E,
Through Public Prosecutor,
Panaji, Goa. .... Respondent.

Criminal Misc. Application No. 170/2005.

Sanjay Gadekar,
presently in Judicial Custody,
Margao, Goa. .... Applicant.

Versus

STATE,
Through the Public Prosecutor,
Panaji, Goa. .... Respondent.

Shri G. Kanekar, Advocate for the Applicants.

Shri S.N. Sardessai, Public Prosecutor for the State/Respondent.

CORAM: N. A. BRITTO, J.

DATE: 14th SEPTEMBER, 2005.

O R D E R :

These are applications for bail by A-3 Sanjay Gadekar, A-4 Shailesh Gadekar and A-6 Smt. Vatsala Gadekar in Sessions Case No. 2/2004 whose bail applications have been rejected lastly by Order dated 10.11.2003 of the learned Addl. Sessions Judge, Margao.

2. A-3 Sanjay Gadekar, A-4 Shailesh Gadekar and A-5 Sheela Barretto are the sons and daughter of A-6 Smt. Vatsala Gadekar respectively and A-1 Valeriano Barretto is the son-in-law of A-6 Vatsala Gadekar. The trial of the Sessions Case has already started and it is informed that about eight prosecution witnesses have been examined so far. Two of the accused are still absconding.

3. After the applications for bail of the present accused were rejected by the learned Addl. Sessions Judge by her Order dated 10.11.03, A-5 Sheela Barretto was admitted to bail by Order of this Court dated 26.5.04 considering the special circumstances of her case namely that she had just then delivered a child who was about fifteen days old. A-6 Vatsala

Gadekar also approached this Court for bail on the ground that she was old and sickly person but that application came to be rejected by this Court by Order dated 16.7.04.

4. The applicants submit that their case for bail be considered on merits, irrespective of the fact that some witnesses have already been examined at the trial.

5. The deceased Shanu Komarpant was murdered on 10.10.03. The facts leading to his assault by the accused and then hanging him, are that the wife of the deceased by name Agnes Komarpant did not like her brother Melvin Sawant visiting A-5 Sheela Barreto and her efforts through her husband and A-1 Valerian Baretto to stop him were not to her satisfaction and did not yield any result and as a result she secured the telephone number of A-5 Sheela Baretto and told her over the phone to stop Melvin Sawant coming to her house, but it appears that she was in no mood to listen and both abused one another over the telephone and A-5 Sheela alleged to have threatened her to teach a proper lesson and this incident she narrated to her husband. On 10.10.03 A-7 Alexander @ Alex and A-4 Shalesh Gadekar approached Navidade Dias and got from him Maruti Van No.GA-02-J-7230 to be driven by A-4 Subhash Gadedkar on promise that the van would be returned at 9.30 p.m. on payment of Rs.600/-. All the

accused then went in search of deceased Shanu Komarpant at about 3.30 p.m. on the same day at Gullem where the deceased was running a garage, but the deceased not there. They met Alex Viegas who suspected that the accused might have come to assault the deceased and he informed his cousin and the first informant in this case Avelino Viegas and the latter telephoned at the residence of the deceased and spoke to his wife in the absence of the deceased. The said Avelino Viegas also went to the house of the deceased and on the way near Santan Bar saw a Maruti van and where A-1 Valeriano Baretto stopped the motorcycle of Avelino Viegas and asked him about the whereabouts of the deceased and at that time al the occupants of the Van surrounded him and A-1 Valeriano told him that he wanted to compromise his differences with the deceased. The said Avelino told them that he would search for the deceased and in case he found him, he would bring him to their residence and went away and came to the house of the deceased where he met Agnes, the wife of the deceased, and as he was talking to her the deceased telephoned and Avelino spoke to him and advised him that he should not come to talk to A-1 Valeriano Baretto as they were too many of them, but the deceased told him that he would like to come to talk to A-1 Valeriano Baretto so that the matter could be compromised and Avelino waited at the house of the deceased when the deceased arrived at 16.00 hrs. on a hired motorcycle along with the said Alex Viegas and then they were proceeding to the house of A-1 Valeriano,

but when they reached nearabout St. Anthony's High School, they saw A-1 Valeriano Baretto along with another person standing on the main road. Avelino stopped his motorcycle and so did the pilot carrying Alex and then the deceased went up to A-1 Valeriano and started discussing with him and while the discussion was going on, A-3 Sanjay Gadekar and A-4 Sailesh Gadekar (subsequently identified as such) along with another person went straight to the deceased-Shanu Komarpant and started assaulting him with fist blows and the said Sailesh/A-4 removed the knife from inside the T-shirt and assaulted the deceased on his face and when the deceased fell down the other two persons continued to kick him on his stomach and the third person assaulted the deceased on his stomach region with a danda and as Avelino tried to stop and shout he was prevented by A-1 Valeriano Baretto by holding him by his arms. A-5 Sheela Baretto is also alleged to have gone straight to the deceased and kicked him on his private parts and A-6 Smt. Vatsala Gadekar is alleged to have abused the deceased with bad words and also kicked him and thereafter the deceased was lifted after he was unconscious and put in the dicky of the van and all the accused went away with the deceased towards Talpona. The said first informant Avelino Viegas after discussing the matter with the neighbours who had gathered there decided to lodge a complaint. He first went and met Agnes and found that the deceased was not brought home. They also searched for the deceased, but he could not be found. In the meantime he lodged the first

information which was initially registered as Crime No.32/03 under Sections 324, 342, 504, 365 r/w 34 I.P.C. and the Police Stations were alerted to detain the Maruti Van which in fact came to be detained at Assolna by Head Constable Rajaram Juwatkar along with accused Nos.1 to 6. As per the statement of said Head Constable Rajaram the aforesaid accused are stated to have told him that the deceased assaulted them and ran away by breaking the rear glass of the Van. The said Head Constable found in the Van blood stained sword, a knife, a bamboo danda and a chapal. A-4 Sailesh Gadekar who was injured was sent for medical examination and the medical officer who examined him at about 7 p.m. found that he was having one incised wound with fracture of the skull on the left fronto parietal region. The dead body of the deceased Shanu Komarpant was recovered subsequently at the instance of A-1 Valeriano Baretto, hanging on a cashew tree with a nylon rope in a cashew plantation at Onxim, Kola, Canacona. The Autopsy report of the deceased shows that he had a ligature mark around the neck and as many as 35 other injuries which included lacerations, bruises, abrasions, etc. on different parts of the body and the forensic expert who conducted the autopsy has given his opinion that the death was due to asphyxia as a result of hanging by nylon rope vide injury No.1. The said expert has also opined that injuries No.2 to 36 were all ante-mortem and fresh at the time of death and taken collectively could be fatal in the ordinary course of nature.

6. Shri Kanekar, the learned Advocate of the applicants has submitted that none of the witnesses examined by the prosecution have explained the injury on A-4 Sailesh Gadekar and this implies that they are not telling the whole truth and in this context Shri Kanekar has placed reliance on the case ***Lakshmi Singh and others etc. v. State of Bihar (A.I.R. 1976 S.C. 2263)***. According to him, the incident must have taken place on provocation given by the deceased himself and therefore it is a case where the accused would be entitled to put forward a plea of right of private defence. According to Shri Kanekar the facts stated by the prosecution even if they are taken as accepted at this stage, will not make out a case of murder under S.302 I.P.C., but at the most, a case under S.304 I.P.C. which cannot invite extreme penalty, in case of conviction.

7. On the other hand, Shri Sardessai, the learned P.P. has submitted that charge under different sections including S.302 I.P.C. r/w S.120-B r/w S.34 I.P.C. has already been framed against the accused and the trial is in progress. Shri Sardessai has further submitted that the accused after assaulting the deceased and rendering him unconscious, abducted him and hanged him to a cashew tree in a jungle and these facts are more than sufficient to prima facie prove that the present applicants are involved in a very serious offence of murder and therefore would not be entitled to bail.

8. It would be improper at the stage of bail to consider the facts stated by the prosecution and reach a finding whether an offence under S.302 or for that matter an offence under S.304 I.P.C. is made out or not since such a finding is bound to come in the way of the trial of the case. The witnesses whose statements have been recorded and who accompanied the deceased Shanu nor those who gathered from the neighbourhood at the time of the assault, have spoken of any injury to A-4 Shailesh Gadekar.

9. The decision in the case of ***Shatrugan Vishram Patil and others v. State of Maharashtra [2004 (1) B.Cr.C. 100]*** relied upon by learned Advocate Shri Kanekar stood on its own facts. It was a case based on circumstantial evidence. In that case initially a case of A.D. was registered and the F.I.R. was filed two days thereafter aganst unknown persons. No doubt in the case of **Lakshmi Singh v. State of Bihar (supra)** the Apex Court has observed that in a murder case failure to explain injuries sustained by accused, the Court can draw inferences either that the prosecution has suppressed the genesis and has not presented a true version or that the witnesses are lying on a most important point or that there is a defence version which could explain those injuries so as to throw doubt on the case of the prosecution. In my view non-explanation of injuries on an accused assumes importance when defence gives a version which competes with probability with that

of the prosecution. As already stated none of the witnesses have spoken about the injury on A-4 Sailesh Gadekar and it is quite probable that the witnesses may give a satisfactory explanation in the course of the trial as and when they are examined. That stage is yet to be reached. At present, in the light of the statements given by them the said injury on A-4 Sailesh cannot be given too much significance when all the statements of the witnesses present are silent about the same. The facts stated hereinabove which are duly supported by the statements of the witnesses whose statements have been recorded show that all the accused engaged the said Van and well prepared went in search of the deceased first at Gulelem and then assaulted him mercilessly until he became unconscious. Even A-6 is stated to have taken part in the said assault by giving bad words to the deceased as well as kicking him. Common intention is a state of mind and can be gathered by inference drawn from facts and circumstances established in a given case. The accused after the deceased became unconscious did not leave him there and disappear from the scene, nor did they take him and keep him at his house to be attended to by the family nor provided him any medical aid, but on the contrary the facts stated are sufficient to infer that they took him in the same van in a jungle and hanged him in that condition to a cashew tree, as a result of which he died due to asphyxia, and as they were returning in the same van they were accosted and detained at Assolna by the said

Head Constable.

10. The aforesaid facts clearly show that the case against the present accused is very grave and the punishment prescribed by law could be very severe and when such is the case the Courts are bound to presume that no amount of bail would secure the presence of the accused for the trial in case they are to be enlarged on bail.

11. Lastly, it has been submitted by Shri Kanekar that the evidence in the case is not very strong and that the test identification parade was not properly held in that no women of the age of A-6 Vatsala Gadekar were placed at the parade. The said submission, has got to be accepted only to be rejected. No doubt, the nature of evidence is also a relevant factor to be looked at. At this stage we are required only to find out whether there is prima facie evidence against the accused to support grave charge of murder against the accused and the probative value of that evidence is not required to be gone into. Even otherwise, It appears from the statements recorded, that A-1 Valeriano, his wife A-5 Sheela Baretto and the mother of the latter A-6 Vatsala Gadekar were well known to some of the witnesses even before the incident and therefore the evidence of test identification may pale into insignificance.

12. In the light of what has been stated hereinabove, the present applicants are not entitled to bail at this stage.

N. A. BRITTO, J.

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